PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

C.H. ROBINSON COMPANY v. KAY GEE PRODUCE COMPANY.
PACA Docket No. R-00-0067.
Decision and Order filed February 15, 2001.

PACA - Breach of contract - Untimely filing, of counter-claim - Market value, determination of.

Complainant contended Respondent owed money for produce received. Respondent's breach of contract claim was held to be timely filed. However, the Judicial Officer (JO) held that he lacked jurisdiction to hear Respondent's counter-claim for overpayment and proceeded to rule on the evidence based upon verified pleadings and the report of the investigation by the [Secretary]. The JO determined (based upon the value of the produce shipped to Respondent using the average market price at the destination method less the reduction in market value of the goods due to defects/spoilage) that the Respondent had overpaid for the produce, but could not recover for his overpayment.

Ben G. Campbell, Minneapolis, MN, for Complainant.
Respondent, Pro se.
George S. Whitten, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. ' 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $3,357.60 in connection with a transaction in interstate commerce involving watermelons.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. ' 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and Respondent filed an answering statement.

Complainant did not file a statement in reply. Complainant filed a brief.

Findings of Fact

1. Complainant, C. H. Robinson Company, is a corporation whose address is 8100 Mitchell Road, Suite 200, Eden Prairie, Minnesota.

2. Respondent, Kay Gee Produce Company, is a corporation whose address is 4900 Crayton,

Cleveland, Ohio. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about June 25, 1998, Complainant sold to Respondent, and shipped from loading point in Wauchula, Florida, to Respondent in Cleveland, Ohio, one truck load containing 2,106 watermelons, or a total 45,100 pounds. The melons were originally billed at $.12 per pound, but Complainant reduced the price on the day of shipment to $.105 per pound.

4. The melons arrived at destination on June 27, 1998, and were accepted by Respondent. On June 28, 1998, at 8:00 a.m. the melons were federally inspected following unloading from the truck. The results of that inspection were as follows, in relevant part:

LOT: A
TEMPERATURES: 68 to 71EF
PRODUCT: Watermelons
BRAND/MARKINGS: "No brand" Bulk
ORIGINS: FL
LOT ID.:
NUMBER OF CONTAINERS: 2016 melons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	02 %	00 %		Quality (Scars)	
	15 %	08 %		Brused (5 - 25%0 (sic)	
	12 %	12 %		Over Ripe (10 - 15%)	
	02 %	02 %		Decay	
	31 %	22 %		Checksum	

GRADE: Fails to grade US No. 1 only account condition

5. Respondent promptly faxed a copy of the inspection certificate to Complainant. Respondent paid Complainant $2,054.00 on December 23, 1998, and also paid Complainant $1,924.50 as an undisputed amount on August 30, 1999.

6. An informal complaint was filed on February 22, 1999, which was within nine months after the cause of action alleged herein accrued.

Conclusions

The first matter that should be discussed is Respondent's apparent attempt at filing a counterclaim. The formal answer (filed September 29, 1999) is very unusual. It starts off with a xerox copy of the

complaint, and the complaint's one exhibit. Underneath this, on Respondent's letterhead, is a caption, and the words: "Respondent above named respectfully answers the allegations." Underneath this is another letterhead page that states AITEM 4." Presumably this refers to paragraph 4 in the complaint. Underneath this is another letterhead page with a brief two paragraph explanation in which Respondent alleges that the one load that is the subject of the complaint was a part of a 20 load contract. The written contract is attached. The answer then proceeds with numerous letterhead pages, each followed by documentation. Respondent finally gets to ITEM 11 which reads as follows:

> Respondent hereby request[s] a judgment in its favor of $19,724.50. This includes lost profit of undelivered watermelon loads totaling $17,500 (14 x 2500 x .504) and the undisputed amount of $1,924.50 [See attached Kay Gee 6] and also include recovery of our filing fee of $300.00.

Although Respondent never stated that it wished to file a counterclaim, it is evident from the substance of Respondent's answer that this is what Respondent had in mind. However there are two problems with Respondent's attempt to file such a claim. First, although Respondent requests recovery of a $300.00 "filing fee," there is no record that either the $60.00 filing fee, or the $300.00 handling fee were ever filed. Second, the contract under which Respondent makes its claim specifies shipment of the 20 loads of watermelons between June 22, and July 1, 1998. A breach of that contract by failure to ship would, of necessity, have taken place on or prior to July 1, 1998. However, Respondent's attempt to file the claim was in connection with the answer filed on September 29, 1999, or far more than nine months after the cause of action accrued.[1] We conclude that we do not have jurisdiction over the counterclaim which Respondent attempted to file.

Complainant alleges that Respondent failed to give timely notice of any breach of contract. Both parties submitted evidence on this point, and we find Respondent's evidence more convincing. Accordingly, we find that timely notice of a breach was given. The federal inspection clearly shows a breach of contract on the part of Complainant as to the June 25, shipment of watermelons. Respondent is entitled to damages flowing from the breach. According to the Uniform Commercial Code, section 2-714(2):

> The measure of damages for breach of warranty is the difference at the time and place

[1] *See Bar-Well Foods Limited v. Valley Packing Services International*, 39 Agric. Dec. 1200 (1980); *B & K Produce Co. v. Shipper's Service Co.*, 33 Agric. Dec. 701 (1974); *Sanders and Drake v. Gardner Bros.*, 31 Agric. Dec. 128 (1972); *Edward G. Hirn v. Sol Fetterman Produce Co.*, 25 Agric. Dec. 258, *petition for reconsideration dismissed* 420 (1966); *I. Meltzer & Son v. J. Lerner & Son,* 21 Agric. Dec. 685 (1962); *Cardoso Bros. v. Unanue & Sons,* 20 Agric. Dec. 1188 (1961); *R. Dixon & Co., Inc. v. Joseph Spagnola,* 17 Agric. Dec. 1057 (1958); *Frank Kenworthy Co. v. D. L. Piazza Co.*, 16 Agric. Dec. 844 (1957); and *Ricks Fertilizer Co. v. M. Dunn & Co.*, 5 Agric. Dec. 194 (1946).

> of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price shown by market reports for the destination market on the first day on which resales could have been made following arrival. No reports are issued for Cleveland, Ohio, but reports for Detroit, Michigan, for June 29, 1998, show that various red meat varieties of 16 to 24 pound watermelons from Florida were selling for $.18 per pound. The value of the 45,100 pound load, if it had been as warranted, was therefore $8,118.00. The value of the melons accepted is best shown by an accounting of a prompt and proper resale of the melons. Respondent did not offer an accounting in evidence; and we will, therefore, use the percentage of condition defects to determine Respondent's damages.[2] Condition defects totaled 29 percent. Applying this percentage to the value of the melons if they had been as warranted gives us $2,354.22 as Respondent's damages.

Respondent alleged that the original purchase price of $.12 per pound was lowered to $.105 per pound, and submitted a manifest faxed by Complainant to Respondent on June 25, 1998, that showed the new price. Complainant nowhere directly rebutted this document, or attempted to explain it. We conclude that the adjusted purchase price of the melons was, therefore, $4,735.50. Respondent's damages deducted from this amount leaves $2,381.28 as Respondent's basic liability on this load. Respondent originally paid Complainant $2,054.00, and subsequently paid Complainant $1,924.50. Respondent has, therefore, considerably overpaid Complainant what was due. Since, however, Respondent did not pay the $300.00 handling fee when it attempted to file a counterclaim, we are unable to award Respondent the excess of what it has paid over what was due. The complaint should be dismissed.

Order

The complaint is dismissed.

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[2] *See Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994); *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993);, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).